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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 1031

KENNETH W. COLEGROVE, PETER J. CHAMALES, AND JEROME G. KERWIN,

Appellants,

vs.

EDWARD J. BARRETT, AS SECRETARY OF STATE OF THE STATE OF ILLINOIS AND AS A MEMBER EX-OFFICIO OF THE PRIMARY CERTIFYING BOARD OF THE STATE OF ILLINOIS; DWIGHT H. GREEN, AS A MEMBER EX-OFFICIO OF THE PRIMARY CERTIFYING BOARD OF THE STATE OF ILLINOIS, AND ARTHUR C. LUEDER, AS A MEMBER EX-OFFICIO OF THE PRIMARY CERTIFYING BOARD OF THE STATE OF ILLINOIS,

Appellees

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM—BRIEF IN SUPPORT OF MOTION.

GEORGE F. BARRETT,
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Appellees

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM—BRIEF IN SUPPORT OF MOTION.

The appellants, who are Illinois citizens and voters, filed this proceeding for injunction and declaratory judgment against appellees, who, as Illinois' Secretary of State, Governor and Auditor, respectively, comprise *ex-officio* Illinois' Primary Certifying Board.

Asserting that the Illinois State Senatorial and Representative Reapportionment Act of 1901 (Ill. Rev. Stats.

1945, Ch. 46, pars. 157, 158, pp. 1590-93) violates the constitutions both of Illinois and the United States because the senatorial districts which it creates no longer contain approximately equal populations, appellants seek to inhibit by injunction or declaratory judgment or both the holding of all future elections to the Illinois General Assembly under this statute.

Since neither appellants nor we are able to point to any provisions of law, state or federal, constitutional or statutory, under which elections to the Illinois legislature can be held at all if elections under the present act are prevented, presumably if the relief sought were to be granted, no election whatsoever of state senators or representatives could be held in Illinois until and unless the Illinois General Assembly should agree upon and pass a new senatorial apportionment act.

More specific exposition of the appellants' allegations of fact and conceptions of law appears in appellants' jurisdictional statement and need not be repeated here.

Suffice it to say in brief summary that under the act here assailed and under sections 6, 7 and 8 of Article IV of the Illinois Constitution of 1870, quoted in appellants' jurisdictional statement, three members of the lower house are to be elected every two years from each of the 51 senatorial districts into which the state is partitioned; and every four years one half of Illinois' fifty-one senators are elected, elections in odd numbered districts occurring in years evenly divisible by four and elections in even numbered districts occurring in so-called "off" years, that is, years divisible by four with a remainder of two.

With respect to the United States Constitution, the appellants contend that the 1901 act violates the privileges and immunities clause and the equal protection clause of the Fourteenth Amendment to the Constitution of the

United States, the "guarantee of Republican Form of Government" embodied in section 4 of Article IV of that Constitution, the "Preamble of the Constitution," and the "Spirit of the Federal Constitution"; and appellants invoke the "Declaration of Independence." Appellants also contend that the act violates the Northwest Ordinance of 1787 and an alleged compact for equal representation which the appellants discern as resulting from an integration of the original Illinois Constitution of 1818 with the Enabling Act of Congress granting statehood to Illinois (April 18, 1818, 3 Stats. 428) and from the references in such original Illinois Constitution and Enabling Act to the Northwest Ordinance.

Appellees filed a motion to dismiss the suit in the nature of a demurrer to appellants' complaint.

The district court rendered the opinion and judgment set forth in appellants' jurisdictional statement.

The issues of law emerge from the appellees' motion to strike appellants' complaint and appear in the brief in support of the motion in this court to dismiss or affirm.

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Appellees

MOTION TO DISMISS THE APPEAL, OR, IN THE ALTERNATIVE, AFFIRM THE JUDGMENT APPEALED FROM WITHOUT FURTHER BRIEFS OR ARGUMENTS.

Appellees, for the reasons stated and argued in the brief in support of this motion, respectfully move this Honorable Court either to dismiss the appeal for want of jurisdiction,

to dismiss it for want of a substantial federal question, or to affirm the judgment appealed from without the filing of further briefs or the presentation of further arguments.

GEORGE F. BARRETT,
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Attorney for Appellees.

WILLIAM C. WINES,
Assistant Attorney General,
Of Counsel.

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Appellees

BRIEF IN SUPPORT OF THE MOTION TO DISMISS OR AFFIRM

Reference to Statement Opposing Jurisdiction for Statement of the Case

The case is stated in the "Statement Opposing Jurisdiction of this Court," to which statement reference is here made to avoid repetition of substance thereof.

ARGUMENT

I

The Federal Courts Would Have Neither the Practical Nor the Jurisdictional Power to Grant Relief in This Case Even If the Appellants Asserted Any Substantive Federal Constitutional Right.

Under Point II of this Argument, *post*, we undertake to argue that under the teachings of this court's applicable decisions, the federal constitution does not guarantee the supposed rights asserted by appellants. But because it is so very clear the federal courts would be without competence, either practical or jurisdictional, to afford any relief to appellants even if their substantive thesis were well conceived and because jurisdictional considerations properly precede those of substantive merits, we first show that the federal courts could not, either practically or consistently with their limited jurisdiction, grant any relief even if the appellants had the rights which they claim.

Appellants ask the federal courts to pronounce invalid the present Illinois Senatorial Reapportionment Act and to interdict by injunction or by declaratory judgment all elections under that statute. But they do not suggest and we cannot conceive under what auspices any election to the Illinois General Assembly could be held should the court prohibit elections under the presently standing law.

In *Wood* v. *Broom*, 287 U. S. 1, and *Colegrove* v. *Green*, 328 U. S. —, 66 S. Ct. 1198, the electors who claimed impairment of their franchise could at least point to a federal statute authorizing election of congressmen at large in the event that the state failed to pass appropriate apportionment acts. Thus, although this court declined relief in both *Wood* v. *Broom* and *Colegrove* v. *Green*, declaring in

both cases that equity could not or should not act in the premises, at least three was no suggestion that the granting of relief sought would prevent *all* elections, thereby disenfranchising all voters of the state until the General Assembly should agree upon and pass a new act.

If, as this court held in *Wood* v. *Broom* and *Colegrove* v. *Green*, equity either lacked or should not exert jurisdiction because of practical considerations exigent in those cases, *a fortiori* the district court properly declined to act in the instant case.

But there are jurisdictional as well as practical inhibitions against action by the federal judiciary in the instant case. In the first place, inasmuch as this is not a suit by one or a small group of private individuals to restrain a private tort threatened against them individually by state officials but is a suit that seeks to coerce by judicial process the election officials of the entire State of Illinois in all future state elections, it is either a suit against the state, in which case it is inhibited by the doctrine of sovereign immunity (cf. *Governor of Georgia* v. *Madrazo*, 26 U. S. 110; *New York Guaranty Co.* v. *Steel*, 134 U. S. 230; *Cunningham* v. *Macon & Brunswick Railroad Co.*, 109 U. S. 446, and *Ford Motor Co.* v. *Department of Treasury of Indiana*, 323 U. S. 459, with which cf. *Mine Safety Appliances Co.* v. *Forrestal*, 326 U. S. 371), or if the declaratory judgment be deemed merely advisory or hortatory, the suit seeks no judicial relief whatever but asks the mere pronouncement of a dictum. (Cf. *Aetna Life Insurance Co.* v. *Haworth*, 300 U. S. 227, sustaining the Declaratory Judgment Act upon the principle that it is applicable only where relief by process can ultimately be granted if necessary.)

This court has recognized that, according to the tenor of some of its opinions, equity has no jurisdiction to act in political matters and, according to the reasoning of other

opinions, such jurisdiction, if it exists, will not be exercised where the result will be wholesale interference with an election. (See *Giles* v. *Harris,* 189 U. S. 475, in which Mr. Justice Holmes denied relief even though the violation of federal constitutional rights of negroes was clear and although the Civil Rights Act was specifically invoked; concurring opinions of Justices Brandeis, Stone, Roberts and Cardozo in *Wood* v. *Broom,* 287 U. S. 1, at page 8, the majority of the court not reaching the jurisdictional question because they perceived the complaint in that case to be clearly without substantive merit; opinion of Justices Frankfurter, Reed and Burton in *Colegrove* v. *Green, supra,* indicating that equity jurisdiction to act by injunction or declaratory judgment does not exist in political matters, and the concurring opinion in that case of Mr. Justice Rutledge assuming that jurisdiction may exist but bespeaking forbearance of its exercise.)

It is submitted that the considerations above developed conclusively demonstrate that the federal courts would have neither the practical nor the jurisdictional competence to grant relief in this case even if the appellants' substantive constitutional conceptions wre well entertained.

In *Cook* v. *Fortson,* 67 S. Ct. 21, — U. S. — (not yet officially reported), this court dismissed an appeal from the judgment of a three-judge district court in Georgia denying injunction and declaratory judgment although the "county unit" system of elections gave two unit votes to Quitman County, with a population of only 3,435, and only six unit votes to Fulton County, with a population of 392,-886. Although this court did not assign a reason for its refusal, the case is obviously pertinent and, we believe, controlling; for whether review was denied upon jurisdictional or substantive grounds (see Point II, post), the case would

appear to be indistinguishable from the case at bar in terms of any important constitutional principle.

Appellants' "Five Similar Cases" Support Appellees', Not Appellants' Arguments

Appellants' jurisdictional statement observes that this court took jurisdiction in each of five allegedly similar cases, namely, *Smiley* v. *Holm*, 285 U. S. 355; *Koenig* v. *Flynn*, 285 U. S. 375; *Carroll* v. *Becker*, 285 U. S. 380; *Wood* v. *Broom*, 287 U. S. 1, and *Mahan* v. *Bruce*, 287 U. S. 575.

Smiley v. *Holm*, *Koenig* v. *Flynn*, and *Carroll* v. *Becker* were writs of *certiorari* to state courts of last resort. In none of these cases was a federal court asked to grant relief by injunctive or other federal judicial process. In each of these cases a state court, *agreeably to the states' modes of judicature*, had passed upon the important federal constitutional question, whether a reapportionment act passed by the legislature but vetoed by the governor derived its efficacy from the Constitution of the United States without gubernatorial approval, or whether such approval, when required by the state constitution, was a part of the legislative process contemplated by the federal constitution. This court's writ of *certiorari* was of course efficient to reach any judgment rendered in accordance with state adjective law that decided a federal constitutional question.

Wood v. *Broom* and *Mahan* v. *Bruce* were appeals from federal district courts. *But in those cases four of the justices held federal equity impotent and five justices did not reach the question because they held that there was no federal constitutional right to approximate equality of representation.* Thus, each of these cases either fails to support or is positively adverse to appellants' position in the instant case.

The Federal Courts Cannot Properly State Constitutional or Other Questions in This Case

If, as we have argued, this court has neither the practical nor the jurisdictional competence to decide this case, or, if, as we argue under Point II, *post*, federal questions presented are not substantial, then there being no diversity of citizenship, there is no basis of federal jurisdiction upon which to predicate relief arising under state constitutional or other law.

But in any event, if the federal courts had jurisdiction to dispense state jurisprudence they would be bound to do so as though they were state courts of equity. And appellants' own jurisdictional statement demonstrates conclusively that Illinois state courts of equity will not grant relief by preventing elections under the Illinois Reapportionment Act of 1901.

II

Appellants Show No Violation of Any Federal Constitutional Right

Appellants' substantive contentions are conceived upon the thesis that the United States Constitution guarantees a right of approximate equality of representation. Unable to point specifically to any provision in the Constitution guaranteeing such a right in explicit terms, appellants invoke the preamble, the "guarantee of a Republican Form of Government" (Art. IV, sec. 4), the Fourteenth Amendment, the spirit of the Constitution, and the Declaration of Independence.

Appellants' contentions are not supported by any holding of this Court declaring that approximate quality in representation is a canon of equal protection, republican form of government, or other specifically guaranteed federal con-

stitutional rights. *Wood* v. *Broom*, 287 U. S. 1, where the claim of constitutional right was expressly raised, holds the contrary.[1] Let us therefore examine the argument on principle.

Even if it be true that approximate equality of representation, at least in the lower house of a congress or a state legislature, is generally regarded as a *desideratum* of enlightened political philosophy, nothing is plainer than that no such doctrine has ever been admitted as a principle of American constitutional law. On the contrary, the negation of any such principle very plainly results from the following considerations:

At the time of the writing and adoption of the original Constitution, slaves could not vote in the South, women could not vote in any state, those not holding freehold tenures in land could not vote in many states, and, as is the case even today, even full fledged citizens not under any other disability can not vote unless they had inhabited the state for a given length of time—in Illinois at the present time, for instance, for a period of one year.

None of the disqualifications, whether on the basis of race, color, previous condition of servitude, sex, estate, length of residence, or otherwise, was removed by the *Fourteenth* Amendment to the Constitution of the United States.

The Fourteenth Amendment, far from inhibiting the denial of suffrage, explicitly contemplates and provides

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[1] In *Wood* v. *Broom*, the appellants, electors of the State of Mississippi, assailed the Mississippi Congressional Reapportionment Act on the ground that, as summarized by Mr. Chief Justice Hughes,

> "the Act violated Article I, section 4, and the Fourteenth Amendment, of the Constitution of the United States"

as well as other grounds. A majority of the court rejected this contention, the minority of four not reaching it because they held that the court had no jurisdiction to entertain it.

for the denial of such suffrage on the ground of race or other basis.

Section 2 of the Amendment reads as follows:

> "Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. *But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged,* Except for participation in rebellion, or other crime, *the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.*" (Emphasis added.)

In other words it was the intent of the *Fourteenth* Amendment that a state must choose between granting equal right of suffrage where male inhabitants were concerned, or suffering an abridgment of its representation in the national government. But nevertheless the choice might be made by the state; and if it was willing to submit to a diminution of representation, it might, so far as any group of male citizens was concerned, disenfranchise them at will. *It was because the Fourteenth Amendment did not guarantee equality of the ballot that the Fifteenth and Nineteenth Amendments were necessary.*

It took the *Fifteenth*, not the *Fourteenth*, Amendment of the Constitution of the United States to inhibit disqualification from voting on the ground of "race, color or previous condition of servitude." And it took the Nineteenth, not the Fourteenth, Amendment to inhibit disquali-

fication on the ground of sex. Of course, the appellants do not suggest that either the Fifteenth or Nineteenth Amendment vests them with any rights in this case. Nevertheless the Fifteenth and Nineteenth Amendments are most important in this case for they demonstrate conclusively that, but for those amendments, there is no constitutional right to equality of representation in any respect whatever; and those amendments guarantee, respectively, only that no such equality shall be impaired on the grounds of race, color or sex.

But is there, as the appellants suggest, some "spirit" immanental within the Constitution of the United States that intends, even if it does not explicitly utter the principle that there shall be a right of equal representation?

Let us see. While the Constitution of the United States does contemplate that there shall be approximate equality of representation on the basis of population in the lower house of Congress so far as state lines are concerned (although not so far as congressional district lines are concerned, *Wood* v. *Broom*, cited *ante*, where a majority of the court explicitly rejected the argument that the constitution requires approximate equality of representation in Congress, see Point I, *ante*), the Constitution of the United States denies equality of representation in the senate; and the house of representatives is powerless to pass any act, however trivial, without the concurrence of the upper house of Congress, in which equality of representation is explicitly denied.

Moreover, the Constitution of the United States does not contemplate or require that there shall be approximate equality in the matter of votes for President and Vice President. This provision, whereby a minority of the people may choose the chief magistrate of the land, has long been deplored by political idealists. It is neverthe-

less the constitutional law of the United States of America.

We have already cited *Cook* v. *Fortson, supra*, as embodying this Court's pronouncement that it would not review where state elections are conducted by the "county unit" system, a system similar to that of the electoral college, notwithstanding great inequalities in the ratio of population representation to unit votes.

The truth is that approximate equality of representation has long been cherished as an ambition on the part of academicians in the field of political theory, such as are two of the appellants in the instant case. But this ideal, far from finding expression or implication in the Constitution of the United States or its "spirit," finds in that spirit complete negation.

Appellants' Claims Founded on the Northwest Ordinance, the Illinois Enabling Act of 1818, and the Constitution of 1818 Are Without Merit.

So far as the appellants rest their claims upon the Northwest Ordinance, either as standing alone or as integrated with the Illinois Enabling Act or the Constitution of 1818, it is sufficient to say that so to construe the Ordinance would be to confer upon the citizens of Illinois federal rights not enjoyed by the thirteen colonial states, the Western states or the Southern states. This would indeed deny "equal protection." The Northwest Ordinance was pressed upon the Supreme Court in *Colegrove* v. *Green* but was not even mentioned by the court.

Conclusion

For the reasons urged in the foregoing brief, it is respectfully submitted that this Court should either dismiss the appeal for want of jurisdiction, dismiss it for want of

a substantial federal question, or affirm the district court without further briefs or argument.

Respectfully submitted,

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